2024 LSBC 34
Hearing File No.: HE20180041
Decision Issued: July 5, 2024
Citation Issued: May 15, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

VALORIE HEMMINGER

RESPONDENT

DECISION ONAPPLICATION TO REOPEN FACTS AND DETERMINATION

Written submissions:	June 10, 2024
Panel:	Jennifer Chow, KC Monique Pongracic-Speier, KC
Discipline Counsel:	Angela Westmacott, KC, Alandra Harlingten
Counsel for the Respondent:	Richard Gibbs, KC

[1] The Respondent, Valorie Hemminger seeks to reopen her case to adduce new evidence (the "Application") in the facts and determination hearing of the citation against her ("F&D Hearing"). The Panel allows the Application in part and on terms, for the reasons that follow.

BACKGROUND

[2] The Application is brought in the context of longstanding proceedings, with a complex procedural history.

[3] A five-paragraph citation was issued against the Respondent on May 15, 2018. The citation alleges that, from time to time between 2011 and 2015, the Respondent engaged in professional misconduct or breached the Law Society Rules (the "Rules") as follows:

(a) the Respondent failed to deposit client trust funds into her pooled trust account as soon as practicable on up to 61 occasions, contrary to Rule 3-51 (now Rule 3-58);

(b) the Respondent failed to immediately report trust shortages in excess of $2,500 or to immediately report her inability to deliver up when due trust funds held for some or all of nine clients, or both, contrary to Rule 3-66 (now Rule 3-74);

(c) on one or more of five occasions, the Respondent misappropriated or improperly withdrew client trust funds, by depositing them into her general account, purportedly as payment for services rendered but when she had not completed all services as described and had not delivered an invoice, contrary to Rules 3-56(1) and 3-57(2) (now Rules 3-64(1) and 3-65(2));

(d) on one of more of 12 occasions, the Respondent improperly withdrew trust funds from her pooled trust account in payment of fees without first preparing and immediately delivering an invoice to her client, contrary to Rules 3-56(1) and 3-57(2) (now Rules 3-64(1) and 3-65(2));[1] and

(e) in some months in 2011, 2014 and 2015, the Respondent failed to prepare trust reconciliations for her pooled trust accounts within 30 days of the effective date of reconciliation, contrary to Rule 3-65 (now Rule 3-73).

[4] The F&D Hearing of the citation commenced September 14, 2020. The Law Society began by entering into evidence the Respondent's response to a Notice to Admit in which the Respondent admitted to some of the acts or omissions at issue in the citation but did not admit to any professional misconduct. The Panel then heard evidence from witnesses called by the Law Society.

[5] On September 16, 2020, the Respondent opened her case and called her first witness. She commenced her own evidence on September 17, 2020.

[1] The Law Society has withdrawn this allegation for six of the occasions, leaving the remaining six in issue.

[6] On September 18, 2020, the F&D Hearing adjourned, with the Respondent under cross-examination, to permit the Respondent to attend to a family emergency.

[7] The F&D Hearing resumed on December 14, 2020. The Respondent completed her evidence. The Respondent then moved to introduce written opinion evidence from Dr. MR, a psychologist, contained in a report dated May 25, 2020. Dr. MR's report responded to a request from Respondent's counsel for an opinion "documenting psychological factors relating to [the Respondent's] complaint by the Law Society". Dr. MR stated that she had been consulted by the Respondent in approximately 100 sessions since December 2012. She stated a psychological diagnosis for the Respondent of Anxiety, Depression and Adjustment Disorder (with mixed disturbance of emotions and conduct), per the DSM-V.[2] Dr. MR provided an opinion on the impact of the Adjustment Disorder on the Respondent.

[8] The Law Society objected to the admissibility of the report on the grounds of relevance. Relying on *Law Society of BC v. Ahuja*, 2020 LSBC 31 and *Law Society of BC v. Gellert*, 2013 LSBC 22, the Law Society argued that Dr. MR's report was not connected to a material issue in the F&D Hearing. The Law Society said that if it were determined that Dr. MR's report is admissible pursuant to the criteria in *R v. Mohan*, 1994 CanLII 80 (SCC), [1992] 2 SCR 9, her opinions may be relevant to disciplinary action but that they were not relevant to whether the Respondent contravened the Rules or misappropriated or improperly withdrew trust funds.

[9] The Panel sustained the Law Society's objection to the admissibility of Dr. MR's report. The Panel held:

> First, the date of Dr. MR's report of May 25, 2020 and her psychological diagnosis of anxiety, depression and adjustment disorder are tendered as a diagnosis made in 2020. This current diagnosis does not assist the Panel in determining whether any of the psychological conditions were relevant factors at the time the conduct occurred as set out in the citation.
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> Second, the Panel does not accept the Respondent's argument that Dr. MR's report is relevant to the assessment of the Respondent's credibility. It is up to this Panel, not an expert, to solely assess the Respondent's credibility and the credibility of any witnesses. It would be an improper delegation of the Panel's function to rely on an expert to assess the Respondent's credibility as a witness.

[2] American Psychiatric Association, *Diagnostic and Statistical Manual,* 5th ed. (2013).

> Finally, based on the counts set out in the citation, Dr. MR's psychological opinion, in our view, is not relevant to the legal test the Law Society must meet to establish the counts set out in the citation.
>
> Based on all of the above and the *Ahuja* and *Gellert* cases cited by both counsel, we find that Dr. MR's report dated May 25, 2020 is not admissible on the basis that it does not meet the test for relevance as set out in *Mohan*.

[10] Following the ruling on Dr. MR's report, the Respondent closed her case. No reply evidence was led by the Law Society.

[11] The F&D Hearing moved to the submissions stage. Argument was initially scheduled for December 18, 2020. However, the Law Society's delivery of a 69-page written submission late in the day on December 17, 2020 prompted the Respondent to seek an adjournment. By consent, the Respondent was given until January 13, 2021 to deliver written submissions, and the Law Society was given a right of written reply by January 20, 2021. Oral argument was scheduled for January 25, 2021.

[12] After the close of business on January 13, 2021, the Respondent filed a notice of application seeking the following relief:[3]

1. The Respondent be at liberty to call further evidence on Facts and Determination at a date to be fixed as a result of her attendances beginning on October 30, 2020 on Dr. [AO], MSc, MD, CCFP, ABAM, of [Clinic], North Vancouver, British Columbia, and his diagnoses of the Respondent as suffering Adult ADHD, Generalized Anxiety Disorder with obsessive features, and Substance Use Disorder, and the effect of those mental illnesses on the issues to be addressed at Facts and Determination.

2. The Respondent also be at liberty to call evidence from Dr. [MR] as to her psychological opinions regarding the Respondent, now that the mental illnesses have been authoritatively diagnosed by Dr. [AO], as to the effect of those mental illnesses on the issues to be addressed at Facts and Determination.

3. The Respondent also be at liberty to call evidence from [MJ], R. Psych., as to his psychological opinions regarding the Respondent, now that her mental illnesses have been authoritatively diagnosed by Dr. [AO], as to the effect of those mental illnesses on the issues to be addressed at Facts and Determination.

[3] Reproduced verbatim from the Respondent's notice of application, except for anonymization.

4. And, in any event, the timetable for the Respondent to deliver written submissions on Facts and Determination, and for the Law Society to respond, be amended and be the subject of further direction by the Hearing Panel when its disposition of the relief sought in Paragraphs 1 and 2 is known.

[13] The Law Society opposed the application.

[14] On January 20, 2021, the Panel denied the application but reversed itself on January 22, 2021, indicating that it would hear the application *de novo*.

[15] Rather than proceed with the application, the Respondent sought judicial review of the Panel's January 20 and 22, 2021 decisions. On January 11, 2022, the Supreme Court dismissed the Respondent's application for judicial review on grounds of prematurity.[4] The Court of Appeal dismissed the Respondent's appeal on January 25, 2023.[5]

[16] The public representative retired from the Tribunal in 2022, while the judicial review proceedings were before the Courts. In July 2022, the Acting Tribunal Chair ordered, pursuant to Rule 5-3(1), that the Panel continue with the remaining members.

[17] On May 31, 2023, the Respondent brought an application for the remaining Panel members to recuse themselves on the grounds of a reasonable apprehension of bias. The application was argued in July 2023 and January 2024, and was denied on April 11, 2024 for reasons issued April 26, 2024 in *Law Society of BC v. Hemminger*, 2024 LSBC 20.[6]

[18] Meanwhile, on December 14, 2023, the British Columbia Court of Appeal had released reasons for judgment in *Ahmadian v. Law Society of BC*, 2023 BCCA 470. The Tribunal proceedings in *Ahmadian* included some allegations similar to those at issue in the present proceedings: the lawyer was cited for allegedly misappropriating and improperly withdrawing trust funds, for failing to report and eliminate trust shortages and for failing to maintain proper trust accounting records. He was also cited for borrowing money from clients, contrary to Rule 3-4(31) of the Rules, for breach of an undertaking and for issuing a trust cheque without having sufficient funds on account to cover it.[7] The Tribunal panel found that Mr. Ahmadian had engaged in professional misconduct, except with respect to the issuance of the trust cheque without sufficient funds on account; on that allegation, Mr. Ahmadian was found to have committed a breach of the Rules.[8] Mr. Ahmadian appealed the panel's decision to the Court of Appeal, pursuant to the *Legal Profession Act*, SBC 1998, c 9, s 48 (the "*Act*").

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[4] *Supreme Court Decision*.
[5] *Appeal Decision*.
[6] See also reasons for decision on the Law Society's objection to evidence tendered in the application: *Law Society of BC v. Hemminger,* 2024 LSBC 07.
[7] *Ahmadian* at para. 4.
[8] *Ahmadian* at para. 18.

[19] One of issues on appeal was whether the panel had erred in law by refusing to admit opinion evidence from two of Mr. Ahmadian's physicians, including on the ground that the opinion evidence was not relevant to the question of whether the lawyer's actions amounted to professional misconduct.[9] The Court of Appeal sustained this aspect of the appeal (as well as others).[10] The Court reasoned that opinion evidence concerning a lawyer's mental health may be relevant to determining whether the lawyer's acts or omissions amount to professional misconduct. This is because the existence of a mental health condition may affect the determination of whether a lawyer acted with *mala fides*, one of the factors which is analyzed, pursuant to *Law Society of BC v. Lyons*, 2008 LSBC 9, to determine whether acts or omissions amount to professional misconduct.[11] The Court reasoned as follows:[12]

> A panel charged with determining whether a member's impugned conduct amounts to professional misconduct must address the presence or absence of *mala fides*. Evidence of mental illness short of total incapacity may be relevant to that analysis. All of the allegations in the Citation have an aspect of poor management or poor judgment. It is at least arguable that none of the deemed admissions are proof of *mala fides.* For that reason, it is arguable that the proffered medical opinion evidence would, in fact, be material to the proof of professional misconduct. In my view, the medical evidence in this case was *prima facie* admissible and logically relevant to the Panel's inquiry. It ought to have been addressed by the Panel.

[20] On April 19, 2024, the Respondent filed an amended notice of application in the Application, repeating the relief sought in paragraphs 1 to 3 of the 2021 notice of application but amending paragraph 4 to read:

> 4. The Respondent be at liberty to call her own evidence and that of such other witnesses as she may advise upon the Hearing Panel ruling that it will consider medical evidence on the Facts and Determination phase of this Citation proceeding.

[21] This decision on the Application is based on the Respondent's 2024 amended notice of application and the materials filed by the parties in respect of it.

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[9] *Ahmadian* at paras. 39, 41, 48, 74.
[10] *Ahmadian* at paras. 86 and 118.
[11] *Ahmadian* at paras. 81 – 83.
[12] *Ahmadian* at para. 83.

THE PARTIES' SUBMISSIONS

[22] The Respondent submits that, until the Panel's ruling on December 15, 2020 that Dr. MR's report of June 7, 2020 was inadmissible, she sought to have her mental state considered in relation to her degree of responsibility. She notes that she has conceded Rules breaches in some instances at issue in the citation but has not admitted professional misconduct. The Respondent submits that this makes her degree of responsibility, and the presence or absence of *mala fides*, the central issue in the F&D proceedings.

[23] The Respondent contends that the Panel erred in law in refusing to admit Dr. MR's 2020 report. Rather than leaving the December 15, 2020 ruling to be addressed on appeal, however, the Respondent seeks to have the proceedings reopened without any restrictions, so that she may, among other things, adduce further evidence from Drs. AO and MR and Mr. MJ, for her to give additional evidence and to call evidence from "collateral witnesses". She submits that, although the power to reopen technically calls for an exercise of discretion on the part of the Panel, there is really no question as to the appropriateness of reopening the F&D Hearing; she is entitled to a full reopening of the hearing, as a matter of justice. The Respondent supports the amended notice of application with reports from Drs AO, MR and Mr. MJ, drafted in 2021 and 2024, and with an affidavit the Respondent made on January 25, 2021, to provide a "snapshot" of the evidence she will call, if the Application is allowed.

[24] The Law Society consents to the F&D Hearing being reopened for the Respondent to lead additional evidence, on terms. The Law Society says that, having considered the *dicta* in *Ahmadian* and the materials provided by the Respondent, it would be appropriate for the Respondent to be permitted to reopen her case to seek to tender the evidence of Drs. AO and MR and Mr. MJ, as well as her own testimony to address the additional medical evidence from her perspective. However, the Law Society does not consent to a reopening to adduce evidence from witnesses not identified by the Respondent, and of which the Law Society has had no notice. The Law Society also says its consent to the Respondent reopening her case is without prejudice to the Law Society's right to challenge the qualifications of experts, to make admissibility objections and to cross-examine on evidence tendered.

[25] In reply, the Respondent argues that the Panel should reject the Law Society's argument that the reopening of the hearing should be limited to only those witnesses identified to date. Respondent's counsel says,

> If and when this Hearing Panel reopens Facts and Determination, Ms. Hemminger will advise of the witnesses to be called and the time needed. There is no proper basis for the Hearing Panel to limit Ms. Hemminger from calling

> other witnesses 'to verify her level of functioning at the time of the events giving rise to the citation issues'.[13]

[26] The Respondent submits that if she had elected to raise these issues on appeal, at the end of the proceeding, she would have been granted a new hearing as of right and there would be no limitation on the witnesses she could call.

[27] Also in reply, the Respondent says that Dr. MR and Mr. MJ "have limited their utility as expert witnesses and are aging-out". As such, "Ms. Hemminger may well need to seek additional expert evidence as well as calling witnesses to testify to the background facts going to her psychological issues impacting the allegations in the citation." The reply submissions offer the first indication that the Respondent may seek to call additional expert evidence, not identified in the amended notice of application, if the hearing is reopened.

[28] On May 27, 2024, the Panel issued a memo to the parties indicating that the Panel takes the view that the question of the proposed "collateral witnesses" should be addressed as part of, and not after, the motion to reopen. We directed the Respondent to identify the collateral witnesses she would seek to call and state the evidence they would be expected to give. We also gave the Law Society the right to state its position and file submissions on the proposed collateral witnesses and for the Respondent to reply.

[29] On May 30, 2024, the Respondent delivered a lengthy and forceful response, pressing two points in particular and offering argument on other, collateral issues. The main points were as follows. First, the Respondent submitted that it is premature for her to identify the collateral witnesses because their evidence would go to supporting "whatever premises or assumptions are important to the expert, forensic, psychological witnesses, yet to be ascertained, yet to be retained and yet to provide their opinions", *after* the Panel's decision in the application to reopen. Second, and despite the fact that the May 27, 2024 memo did not invite further submissions on expert evidence, the Respondent confirmed that she intends to "put in" further opinion evidence from experts not yet retained, if the F&D Hearing is reopened.

[30] The Law Society, in response, answers the Respondent's arguments. The Law Society expresses its continued disagreement with the proposition that it would be appropriate to reopen the hearing to allow the Respondent to call unidentified collateral witnesses to provide "background facts", without further particulars. The Law Society says, however, that in the interest of moving this proceeding forward, it consents to the hearing being reopened to allow the Respondent to tender expert evidence from non-treating psychologist(s).

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[13] The internal quotation is from paragraph 9 of Part 2 of the amended notice of application.

ISSUES

[31] Should the F&D Hearing be reopened for the Respondent to adduce further evidence?

[32] If so, should the reopening occur on terms?

[33] If so, what terms are appropriate?

APPLICABLE LAW

[34] The Panel has the authority to reopen the F&D Hearing, as the proceedings are not yet complete, no decision has been issued on the citation, and the Panel is not *functus officio*. Whether to reopen is a discretionary decision.[14]

[35] Consistent with her submission that she is "entitled" to have the hearing reopened to adduce additional evidence, the Respondent makes no submission on the legal criteria that should guide the Panel's discretionary decision-making with respect to the Application. The Law Society, citing from *Re Newcombe*, 2022 LSBC 14, submits that the common law criteria for a party to reopen its case should apply. We agree that our discretion should be guided by the common law criteria. We disagree with the Respondent's submission that suggests she has an automatic entitlement to reopen her case in the F&D Hearing.

[36] In *Re Newcombe*, the lawyer sought to adduce new evidence after he had closed his case in proceedings on disciplinary action. The panel described the applicable law as follows:[15]

> … [T]he jurisprudence in the administrative, criminal, and civil contexts establishes that in such cases a party must seek leave of the tribunal to do so, because the late introduction of evidence can cause unfairness to the opposing party and undermines (*sic*) the orderly and expeditious conduct of the proceeding. …
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> … First, in deciding whether to allow a party to re-open its case to adduce additional evidence, the tribunal is exercising a discretion in the interests of justice. Second, the tribunal must have some understanding of the proposed evidence in order to weigh the factors relevant to the exercise of discretion. Third, those relevant factors include:

[14] *Vander Ende v. Vander Ende*, 2010 BCSC 597 at para. 84.
[15] *Re Newcombe* at paras. 45 – 46; internal citations omitted.

(a) the probative value of the proffered evidence on the matters in dispute (the higher the probative value, the more likely the interests of justice favour its receipt);

(b) the reason why the evidence was not led as part of the party's case (while the evidence is unlikely to be excluded solely because of a lack of due diligence by counsel, if it was not called earlier due to a tactical decision the application to reopen is less likely to be granted);

(c) whether the opposing party would be prejudiced if the proceeding was reopened to permit the evidence to be called, and if so, whether and how such prejudice could be alleviated; and

(d) the effect of reopening on the orderly and expeditious conduct of the proceeding, which includes a consideration of how much time has passed since the party's case was closed, whether the evidence can be called immediately, the time needed to call the evidence, whether the opposing party will likely call further evidence in response, and whether additional closing arguments will be required.

[37] We are guided by these factors in the analysis that follows.

ANALYSIS

[38] In deciding whether to permit the Respondent to reopen her case in the F&D Hearing to adduce additional evidence, we must consider what the interests of justice demand. In particular, we must consider how a decision to allow or refuse the Respondent leave to reopen her case, as requested, would impact the interests of the Respondent and of the Law Society in the F&D Hearing, the public interest in the timely hearing of disciplinary matters and the impact of the proposed reopening on the conduct of the proceedings.

[39] We will begin by considering the Respondent's proposal to call evidence from Drs. AO and MR, Mr. MJ and one or more non-treating psychologists, and to give additional evidence herself. We will then consider the Respondent's application for leave to reopen to call evidence from collateral witnesses.

Evidence from treatment providers, independent experts and the Respondent

[40] The Law Society concedes that, following *Ahmadian,* evidence from Drs. AO and MR and Mr. MJ may be relevant to the allegation of misappropriation. Although not explicitly stated by the Law Society, we infer that the Law Society would take the same

position with respect to evidence from one or more non-treating psychologists. As we understand it, the Law Society also agrees that further evidence from the Respondent as to her state of mental health may be relevant. We agree with all of this, provided that new evidence from the Respondent, her treatment providers and any independent experts retained by her would address the Respondent's mental health and psychological condition(s) *at the time of the events at issue in the citation*. The Panel recalls that one of the reasons that Dr. MR's June 7, 2020 report was not admitted into evidence was because we found that it would not assist the Panel in determining whether any of the psychological conditions discussed by Dr. MR bore on the conduct set out in the citation.

[41] The Law Society agrees that it would not be prejudiced by an order allowing the Respondent to give additional evidence relating to her mental health, to adduce evidence from Drs. AO and MR and Mr. MJ, or to adduce expert evidence from one or more wholly independent experts, provided that the Law Society has the ability to object to the admissibility of evidence sought to be adduced, and can cross-examine and provide additional closing argument on new evidence. We accept the Law Society's assessment of prejudice.

[42] The Law Society says that the delay in bringing this application while "perhaps not completely satisfactory" does not militate against reopening. We agree that the Application should not be decided on grounds of delay given the unique circumstances of this case. The Respondent first moved to reopen her case in January 2021. The delay since then is mostly attributable to the time taken by the intervening judicial review proceedings.

[43] As to the reason why the proposed evidence was not adduced as part of the Respondent's case in 2020. As we understand it, the Respondent's assessment by Dr. AO in the fall of 2020, and the physician's diagnosis of previously undiagnosed conditions, is the primary motivator for the Respondent's Application. It is not clear from the submissions why the Respondent did not in December 2020 seek to call the evidence she now seeks to lead, especially as she first consulted Dr. AO on or about October 30, 2020, and there is evidence that she had multiple consultations with Dr. AO in 2020.[16] Nonetheless, in our view, the lack of explanation for why the evidence was not adduced before the Respondent closed her case should not weigh too heavily in the determination of the Application, particularly given the unsettled state of the law on the relevance of mental health evidence to professional misconduct allegations in 2020, and the Law Society's consent to Application, on terms.

[16] Affidavit #1 of VF. Hemminger, made January 25, 2021 in Supreme Court No. S210865, Vancouver Registry, at para. 3, Ex 1 and Ex 4, para. 18.

[44] Finally, we are of the view that permitting the Respondent to reopen her case to lead new evidence from herself and Drs. AO or MR, Mr. MJ or one or more independent psychologists, on appropriate terms, would not impair the orderly conduct of the F&D Hearing. As a Tribunal, we may determine the practice and procedure to be followed at a hearing, pursuant to Rule 5-1.1(2). We discuss the terms that will apply to the reopening the F&D Hearing for the Respondent to lead this evidence, below.

Evidence from the collateral witnesses

[45] The purposes of the proposed evidence from collateral witness have been variously described in the Respondent's submissions as evidence to "verify" or "testify to" the Respondent's "level of functioning at the time of the events giving rise to the citation issues", to "testify to the background facts going to her psychological issues impacting the allegations in the citation", and to support "whatever premises or assumptions are important to the expert, forensic, psychological witnesses, yet to be ascertained, yet to be retained and yet to provide their opinions".

[46] While the Respondent's submissions describe some *potential functions* of the proposed evidence from collateral witnesses, they provide no information on *what the gist of the evidence would be*. In the absence of such information, the scope and utility of the proposed collateral witness evidence is entirely speculative. It is also impossible for the Panel to assess whether any of the proposed evidence is likely to be of probative value to the issues the Panel must decide.

[47] Moreover, if, as the Respondent has maintained, that since the beginning of the F&D Hearing she "sought to have her mental state considered on her degree of responsibility",[17] the Panel is left to wonder why the unspecified collateral witness evidence to "testify to" or "verify" her level of functioning was not called before she closed her case. The ruling on Dr. MR's expert evidence came at the very end of the Respondent's case, not part way through. The Respondent gave no indication during her case that she might seek to call additional evidence, other than Dr. MR's June 7, 2020 report. It is, moreover, difficult to see how Dr. AO's diagnosis of psychological conditions not diagnosed by Dr. MR or Mr. MJ – the driver of the Application – would have any bearing on the relevance of the collateral witness evidence the Respondent now seeks to have the right to lead. "Background" evidence on the Respondent's mental or psychological state, and evidence about her "level of functioning" at the times at issue in the citation does not depend on a diagnosis. Rather, the opposite must be true: a diagnosis may describe, explain or otherwise give a basis to understand facts about a person's psychological condition, but the diagnosis does not create those facts; the facts

[17] Respondent's Written Submissions on Amended Notice of Application, April 19, 2024, at para. 5.

are logically prior to the diagnosis. Additionally, the Panel has heard extensive testimony from the Respondent herself about her psychological condition and she will have the opportunity to supplement her evidence.

[48] All of the foregoing suggests to the Panel that the Respondent is not herself clear on whom she may call as "collateral" witnesses. It is difficult for the Tribunal to accede to the idea that the F&D Hearing should be reopened for indeterminate purposes. Moreover, the Respondent does not suggest that the proposed, unnamed witnesses were not called because of inadvertence or error on counsel's part. She simply asserts that she must have the right to call them in future, if she deems it necessary or advisable to do so.

[49] We agree with the Law Society that granting unfettered leave to the Respondent to call unspecified evidence from unidentified witnesses would tend to operate to the Law Society's prejudice in the F&D Hearing. Of course, this prejudice might be alleviated by adjourning the proceedings to allow the Law Society to consider its position on, and/or respond to, proposed new evidence, when the Respondent makes a final decision on what additional evidence she may want to call. This, however, raises the spectre of the relief sought in respect of collateral witness evidence having an indeterminate impact on the orderly and expeditious conduct of the proceedings.

[50] The proceedings in the F&D Hearing have been protracted. There have been several significant delays and a series of lengthy adjournments. The unfettered leave that the Respondent seeks to call collateral witnesses in the future, should she eventually make a decision to do so, risks prolonging the proceedings without compelling justification. In addition to considering what is necessary to ensure fairness in the proceedings to the Respondent and to the Law Society, the Panel must also consider what is in the public interest. In general, it is not in the public interest for the Tribunal to allow disciplinary proceedings under the *Act* to stretch out over a period of many years. As the Supreme Court said in the oft-cited case of *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para 46:

> Inordinate delay in administrative proceedings, as in other proceedings, is contrary to the interests of society. Decisions by administrative decision-makers need to be rendered promptly and efficiently. …

[51] In the Panel's view, the public interest does not favour granting the Respondent unfettered leave to call unspecified evidence from unidentified collateral witnesses at a future date. Procedural fairness does not demand that such relief be granted and, in our view, the public interest would not be well-served by it.

[52] In conclusion, the Respondent has not persuaded the Panel that it is in the interests of justice to grant her unfettered leave to call collateral witnesses upon a reopening of the

F&D Hearing. The interests of justice do not demand this result and, in our view, such relief is not conducive to the orderly and expeditious conclusion of these longstanding proceedings. At the same time, the Panel is not insensitive to the possibility that the Respondent may need to call evidence, other than her own evidence, to establish the factual foundations for expert opinion evidence. The Respondent therefore shall have leave to re-apply, as discussed below, to adduce evidence from witnesses other than herself or her treatment providers or experts, for the limited purpose of establishing facts on which expert opinion evidence is based. Otherwise, the application for leave to adduce evidence from collateral witnesses is denied.

Should any conditions be imposed on the Respondent's request to reopen her case in the F&D Hearing? If so, what are the appropriate conditions?

[53] As set out above, we are persuaded that it is appropriate to grant leave to the Respondent to reopen her case in the F&D Hearing for limited purposes. To restate, those purposes are:

(a) for the Respondent to call evidence from Drs. AO and MR, Mr. MJ and one or more non-treating psychologists about her psychological or mental condition at the time of the events at issue in the citation; and

(b) for the Respondent to give additional evidence connected to the evidence to be given by treatment providers or independent experts.

[54] In addition, the Respondent may re-apply to adduce ordinary fact evidence necessary to provide the foundations for expert opinion evidence.

[55] To promote the fair, orderly and efficient conduct of the remaining proceedings in the F&D Hearing, leave to the Respondent to reopen her case to adduce further evidence is subject to the following conditions and directions:

(a) Duplicative evidence as between the witnesses is to be avoided.

(b) Pursuant to Rule 5-6(6), we direct that the direct evidence of the treatment providers and any independent experts is to be given in writing and may be presented in a report or by affidavit. Expert opinion evidence shall comply with the requirements of Practice Direction 9.6(2).

(c) The Respondent may give direct evidence orally or by affidavit but, in any event, shall do so under oath or affirmation, as previously. The Respondent's evidence shall not duplicate evidence she has already given in the F&D Hearing.

(d) The reopening of the Respondent's case in the F&D Hearing is without prejudice to the Law Society's ability to object to the admissibility of any new evidence.

(e) The Law Society shall have the right to cross-examine on expert qualifications and on any direct evidence led on re-opening.

(f) Reports or affidavits from the treatment providers or independent expert(s) shall be served on the Law Society and filed with the Tribunal within 60 days of the date of this ruling except that the Respondent may seek an extension to the deadline should one or more of witnesses be unable to meet it. Any such request for an extension of time shall be supported by evidence showing why the deadline cannot be met.

(g) Within two business days of when affidavits or reports are served and filed, the parties shall advise the hearing administrator of their availability for a one-hour case conference within the following 21 business days.

(h) If the Respondent intends to seek leave to lead evidence from lay witnesses other than herself to underpin expert opinion evidence, she shall, at least three business days before the case management conference is to occur, file a notice of motion for leave to do so. The notice of motion shall specify the witnesses the Respondent would call and summarize the evidence they would give.

(i) At the case conference, the Law Society shall confirm:

i. whether it will object to any of the evidence of the treatment providers or expert witnesses;

ii. which of those witnesses it will call for cross-examination, whether on qualifications or on other evidence;

iii. its time estimates for cross-examination of the treatment providers and/or experts; and

iv. whether it consents to or opposes the calling of any lay witnesses the Respondent, by re-application, seeks leave to call.

(j) At the case conference both parties must be prepared to speak to hearing dates and the amount of time estimated to be necessary to conclude the evidence phase of the F&D Hearing.

(k) Both parties may address new evidence heard in the reopening of the Respondent's case in the F&D Hearing in closing submissions.

[56] Finally, for clarity, we confirm that this ruling does not decide the admissibility in the F&D Hearing of any evidence led by the Respondent in this Application. If the Respondent wishes to rely on any of that evidence at the reopened F&D Hearing, she is to address the matter at the case conference.